2003 BNH 033 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 00-13053-JMD
Chapter 7

Hugh H. Davis,
Debtor

Diane Davis,
Plaintiff

v. Adv. No. 01-1038-JMD

Hugh H. Davis,
Defendant

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Attorney for Plaintiff

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Dover, New Hampshire
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MEMORANDUM OPINION

I. INTRODUCTION

Diane Davis (the "Plaintiff") filed the above captioned adversary proceeding on February 5, 2001, seeking a determination that a certain obligation owed to her under a Divorce Decree[1] by her ex-husband, the Debtor, is nondischargeable pursuant to section 523(a)(5), (a)(6), and

[1] See Exhibit 1.

(a)(15).[2] The Court held a two-day trial commencing on August 11, 2003. This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The parties are presently divorced. Throughout the majority of their marriage the Debtor was a veterinarian in private practice[3] and the Plaintiff taught in the public school system. Starting in 1992, the Debtor inexplicitly failed to file his personal and business federal income tax returns. Finally in 1995 the Debtor filed all the missing income tax returns. Predictably this led to a substantial tax liability to the federal government.

The Plaintiff was unaware of the missed tax returns or the outstanding tax liability until she attempted to cash a check at her bank in 1996 and was informed that the Internal Revenue Service (the "IRS") had levied her account.[4] The IRS also levied the Plaintiff's wages from the school district over a period of two years.

Soon after the IRS difficulties came to light, the parties filed for divorce, which resulted in prolonged and acrimonious litigation as to the custody of the children, the division of assets and

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[2] Unless otherwise indicated, all references to "section" refer to Title 11 of the United States Code.

[3] The Debtor owned and operated the Kingston Animal Hospital (the "Veterinary Practice") from 1987 until he voluntarily closed it in February 2000.

[4] The Plaintiff testified that she had always handed her W-2's to the Debtor and that he told her that she did not need to sign their personal income tax returns because his accountant had a power of attorney, which the Debtor's testimony collaborated.

liabilities, and the payment of child support. After a contested final hearing, a Divorce Decree was entered on February 9, 2000. The Divorce Decree provided that the parties would have joint custody of the children, with the Debtor paying child support to the Plaintiff.[5] The Divorce Decree also provided that the Debtor would be responsible for paying the entire IRS debt and the mortgage on their marital home (the "Property").[6] The Debtor was also awarded the Veterinary Practice. The Plaintiff was awarded a cash sum of $135,000 as her one half interest in the Veterinary Practice, with payments of $5,000 a year until the IRS debt was resolved and then payments of $35,000 per year thereafter, with the balance due and payable upon the sale of the Veterinary Practice.

Soon after the Divorce Decree was issued, the Debtor permanently closed the Veterinary Practice. The Debtor testified that he netted $110,000 in 1996, $134,000 in 1997, and $98,000 in 1998 from his business. Furthermore, the Debtor testified that he made no effort to sell the Veterinary Practice; he simply put all the equipment in storage and left a message on the answering machine that the Veterinary Practice was closed because of a divorce court decision. See Exhibit 7.

Following the closure of the Veterinary Practice, the Debtor worked for various veterinary practices before ending up with his current employer, Riverside Veterinary Hospital where his salary is approximately $69,000 a year. The Plaintiff is currently employed as a school teacher

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[5] Child support payments were originally set at $2,507 a month in 1999. See Exhibit 2. They were lowered to $2,264 a month ($566 per week) in 2000. See Exhibit 3. And in 2001, the child support payments were lowered again to $792 a month. See Exhibit 4.

[6] At some point the Property was also the location of the Veterinary Practice and an apartment. At the time of the divorce there was no equity in the Property.

and has a gross income of $48,550; she also receives $200 a week in child support payments from the Debtor.

Sometime in the summer of 2000 the Debtor moved out of the Property to live with his fiancé. The Property has been left vacant since. The Debtor has made no effort to rent or sell the Property and the Property has fallen into a serious state of disrepair. At some point during the Debtor's bankruptcy case the mortgage lender filed a motion for relief in order to foreclose on the Property. The Debtor's mother, through an entity called the Davis Living Trust, purchased the mortgage on the Property.[7]

The issuance of the Divorce Decree has not ended the legal wrangling between the parties. The Debtor appealed the Divorce Decree to the New Hampshire Supreme Court and filed for bankruptcy protection on November 2, 2000. On February 5, 2001, the Plaintiff filed the above captioned adversary proceeding seeking the Court to find the $135,000 cash award as nondischargeable under section 523(a)(5), (a)(6), and (a)(15).

III. DISCUSSION

A. Count I of the Complaint: Section 523(a)(5)

Section 523(a)(5) of the Bankruptcy Code provides in relevant part:

> A discharge under . . . this title does not discharge an individual from any debt . . . to a spouse, former spouse, or child of the debtor . . . for alimony to, maintenance for, or support of such spouse or child, in connection with a . . . divorce decree . . .

11 U.S.C. § 523(a)(5). The crucial issue in determining whether a debt arising from a divorce decree is nondischargeable under section 523(a)(5) is whether the debt is actually in the nature of

[7] The mortgage is approximately $110,000, the IRS has a $99,000 lien on the Property and there are back real estate taxes that are being incrementally paid off.

alimony, maintenance, or support rather than a property settlement. The determination of this issue is a question of federal bankruptcy law. See Bourassa v. Bourassa (In re Bourassa), 168 B.R. 8, 10 (Bankr. D.N.H. 1994); Coe v. Johnson (In re Johnson), 144 B.R. 209, 214 (Bankr. D.N.H. 1992). The party seeking the nondischargeability finding bears the burden of proof. See Zalenski v. Zalenski (In re Zalenski), 153 B.R. 1, 3 (Bankr. D. Me. 1993).

The issue of whether an obligation is in the nature of alimony, maintenance, or support turns solely on the issue of whether, at the time of the divorce, the obligation was intended to have such a purpose. See Bourassa, 168 B.R. at 10. In determining intent, the Court considers three primary factors: (1) the language and substance of the agreement or order; (2) the relative financial circumstances of the parties at the time of the agreement or order; and (3) how the payment at issue is structured (e.g., whether it is periodic or a lump sum, or whether it terminates upon the occurrence of a future contingent event). Smith v. Anderson (In re Anderson), 1999 BNH 034 (Bankr. D.N.H. 1999). "These factors are listed in descending order with respect to interpretative significance and will be used only as aids in resolving the question of intent." Id.

The Court finds that the Debtor's obligation to pay $135,000 to the Plaintiff in installments of $5,000 a year until the IRS debt was resolved and then payments of $35,000 per year thereafter, with the balance due and payable upon the sale of the Veterinary Practice is not in the nature of alimony, maintenance, or support but rather is part of the division of marital assets. The language and substance of the Divorce Decree plainly indicate that the $135,000 obligation was intended as a property settlement. Paragraph 20 of the Divorce Decree, titled "Business Interests of the Parties," provides in part:

> Respondent [the Debtor] shall pay to petitioner [the Plaintiff] the sum of $135,000, as her one-half interest in the business.

See Exhibit 1.

On its face, this provision deals with a division of property, i.e., the Debtor's business. The state family court treated the business as an asset that should be divided between the parties, rather than list the $135,000 obligation under paragraph 4 of the Divorce Decree, titled "Alimony," which provides in full: "Each of the parties being self-supporting, neither party shall pay alimony to the other."

The Court also notes that the cash payments required by paragraph 20 of the Divorce Decree were not subject to termination upon either (1) the Plaintiff's death or remarriage or (2) the Debtor's death, unlike traditional obligations to provide alimony. This tends to suggest that the payments were not intended to be a form of support for the Plaintiff but instead were part of a property settlement, which obligation could be pursued by the Plaintiff upon the Debtor's death or by the Plaintiff's estate upon her death.

While the Court is cognizant of the difference in financial resources and outlook between the parties at the time of their divorce in 2000, the language and substance of the Divorce Decree suggest that the $135,000 obligation is a property settlement, and not alimony, maintenance, or support. Under such circumstances, the disparity in the parties' financial situation is a less significant factor in determining the parties' intent at the time of the divorce.

Overall, it appears from the Divorce Decree that the Debtor's $135,000 obligation was intended to provide the Plaintiff with her share of the Debtor's business. The Plaintiff has failed to meet her burden of proof to establish that the Debtor's $135,000 obligation to her is the kind of obligation described in section 523(a)(5) of the Bankruptcy Code. Accordingly, judgment on Count I of the complaint shall be entered for the Debtor.

B. Count II of the Complaint: Section 523(a)(6)

A debtor's discharge may be denied for the willful and malicious injury by the debtor to another entity or the property of another entity.[8] 11 U.S.C. § 523(a)(6). Section 523(a)(6) states:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . .
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(6).

In order for the Plaintiff to win under section 523(a)(6), she must establish by a preponderance of the evidence[9] the following four elements:

1. the Debtor injured her or her property;
2. willfully;
3. and maliciously; and
4. by such injury, gave rise to the debt at issue.

In re Gorchev, 275 B.R. 154, 165 (Bankr. D. Mass. 2002).

1. The Debtor injured her or her property

It is clear from the record that the Plaintiff was injured by the Debtor's actions. It is apparent from the Divorce Decree that the state family court erroneously only envisioned two possible scenarios involving the Veterinary Practice: either the Debtor would continue the business or the Debtor would sell the business. The Divorce Decree contemplated these scenarios by setting up a payment plan if the Debtor continued to run the Veterinary Practice or in the

[8] The Court notes that one of the fundamental policies of the Bankruptcy Code is the fresh start afforded to debtors through the discharge of their debts. Accordingly, exceptions to discharge should be strictly construed against an objecting creditor and in favor of the debtor.

[9] Grogan v. Garner, 498 U.S. 279, 111 (1991); Palmacci v. Umpierrez, 121 F.3d 781, 787 (1st Cir. 1997) (holding that the burden of proof rests with the party contesting the dischargeability of the debt).

alternative if the Veterinary Practice was sold the Plaintiff's interest[10] would become immediately due and payable. The court apparently did not contemplate the Debtor simply locking the doors and walking away from what appeared to be a profitable business.[11] By allowing a valuable asset to waste the Debtor directly injured the Plaintiff who had a one-half interest in the Veterinary Practice.[12]

2. Willfully

The Supreme Court has addressed the proper interpretation of the term "willful" under the discharge exception in section 523(a)(6) in Kawaauhau v. Geiger, 523 U.S. 57 (1998). That opinion held that the word "willful" modifies the word "injury" and therefore a deliberate or intentional injury is required for nondischargeability and not simply a deliberate or intentional act that leads to injury. Id. at 62. As such, section 523(a)(6) does not encompass recklessly or negligently inflicted injuries. Id. Counsel for the Debtor conceded at trial that the Debtor's actions in closing the Veterinary Practice were in fact willful.

3. Maliciously

The bankruptcy court in McAlister v. Slosberg (In re Slosberg), stated that "[e]stablishing malice can no longer rest upon demonstrating intent to cause injury as it did in this Circuit prior to Geiger. Malice must add *something* to the section 523(a)(6) equation. But what?" 225 B.R. 9, 20 (Bankr. D. Me. 1998) (emphasis in original). Finding support in the pre-Geiger case law, the

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[10] $135,000 as her one-half interest.

[11] The Debtor testified that he netted $110,000 in 1996, $134,000 in 1997, and $98,000 in 1998. Inexplicitly there was no testimony or evidence regarding 1999 the last full year the Veterinary Practice was in operation.

[12] The Debtor has not contended otherwise.

court concluded, "[a] showing of malice requires a showing that the debtor's willful, injurious conduct was undertaken without just cause or excuse." Id. at 21.

The Plaintiff has to show, by preponderance of the evidence, that the Debtor's conduct in closing the Veterinary Practice was undertaken without just cause or excuse. The Plaintiff elicited testimony from the Debtor that the Veterinary Practice was extremely profitable in the years leading up to the parties divorce. Furthermore, the Debtor testified that he made no attempt to sell the business as a going concern or in pieces.[13] While convincing, the linchpin of the Plaintiff's case is the answering machine recording that the Debtor left at the Veterinary Practice. The recording stated in part, "Due to a divorce court decision forcing a bankruptcy we will be closing permanently . . . Friday, March 3 . . . we simply have no other option . . ."[14] Exhibit 7. This statement by the Debtor contemporaneously with the closing of the Veterinary Practice is evidence of his state of mind and intent at the time that he closed his Veterinary Practice. The Debtor specifically stated that the closure was due to a divorce court decision and not some other possible cause. Based upon this evidence and the terms of the Divorce Decree, the Court finds that the Plaintiff has met her burden to produce sufficient evidence to meet her burden of persuasion and establish a *prima facie* case under Count II. See Garrity v. Hadley (In re Hadley), 239 B.R. 433, 437 (Bankr. D.N.H. 1999). Accordingly, the burden of presenting evidence to rebut the Plaintiff's case shifts to the Debtor.

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[13] The Debtor's testimony covered two days, in order to accommodate the schedules of other witnesses. On day two of the Debtor's testimony he testified that he just remembered that his fiancé attempted to acquire a bank loan to purchase the Veterinary Practice but was denied. Even if true, this does not change the fact that the Debtor made no effort to market the Veterinary Practice to third parties.

[14] The Court takes judicial notice that the Divorce Decree was entered on February 8, 2000, and under New Hampshire Superior Court Rule 209, the Divorce Decree does not become final until the expiration of the thirty-day appeal period, on or about March 8, 2000. And that the Debtor did not file for bankruptcy until November 2, 2000, almost eight months later.

The Debtor testified that the Veterinary Practice was experiencing financial difficulties long before the Divorce Decree was entered. He testified that the state family court ordered him to move the Veterinary Practice from the Property and into a separate location in the fall of 1998. This move, according to the Debtor put a significant financial strain on the Veterinary Practice. Additionally, the Debtor testified that his computer system was not Y2K compliant and he could not afford to replace the computer system.

However, the Debtor did not submit any evidence to corroborate his otherwise self-serving testimony. The Court notes that the Debtor testified that he netted $98,000 in 1998, the year of his supposedly costly move. While this sum was a $36,000 decrease from the year before, it hardly reflects a business that was in dire financial straits.[15] Even more telling was the lack of any evidence on the financial condition of the Veterinary Practice in 1999 and early 2000. If the Veterinary Practice was swimming in red ink, the Debtor should have had some sort of financial records and/or testimony from a third party (i.e., an accountant or bookkeeper) to corroborate the Debtor's testimony.[16] In regards to the Y2K issue with the Debtor's computer system, the Debtor again did not submit any evidence, such as contemporaneous proposals from computer vendors or consultants regarding such costs. The Court notes that the Veterinary Practice was in operation until March 3, 2000. The computer system was apparently working at that time. In summary, the Court finds the Debtor's testimony on the reasons for the closure of his Veterinary Practice to be

[15] The Debtor has also failed to explain why his current income of $69,000 per year as an employee of a veterinary practice is financially better than 1998 ($98,000), the last year for which he presented evidence of the income as the owner of a veterinary practice.

[16] The Court notes yet again that neither party submitted evidence regarding the Veterinary Practice's financial health for 1999.

self-serving, uncorroborated and insufficient to rebut the *prima facie* case established by the Plaintiff.

At trial the Debtor frequently relied on the First Circuit's decision in Roumeliotis v. Popa (In re Popa), 140 F.3d 317 (1st Cir. 1998). In Popa, the Debtor owned an automobile station located in a high crime area. Id. at 317. In direct violation of state law, the debtor did not acquire workers' compensation insurance. Id. While working alone at night, the plaintiff was severely beaten on the debtor's premises. Id. The First Circuit found that the debtor did not act with actual intent to cause the plaintiff injury, but was rather reckless or negligent, and accordingly the damages arising out of the assault did not fall within the compass of section 523(a)(6). Id. at 318.

The facts of Popa are easily distinguishable from the instant case. The court could have found that by not acquiring workers' compensation insurance the debtor was merely trying to save money. As the court stated, "Popa's failure to obtain insurance was not done, as in Geiger, with the actual intent to cause injury." Id. At 318. Popa was merely negligent. The assault was not an immediate and obvious consequence to the lack of insurance coverage. However, in the instant case by willingly closing the Veterinary Practice, only one other person, other than the Debtor was injured and that was the Plaintiff.

The evidence presented to the Court leads inescapably to only one explanation for the Debtor's closing of his Veterinary Practice. He intended to deprive the Plaintiff of the interest in the business awarded to her by the state family court. The Debtor has offered only his own self-serving testimony to rebut his public statement on the reason for the closing and has presented no evidence regarding his income for the fourteen months preceding his decision to close the Veterinary Practice. The Debtor presented no evidence that he made any serious effort to sell the practice as a going concern or even to sell his customer list and/or business equipment. Based

upon the evidence presented by the parties, the Court finds that the Debtor acted with malice and that his actions were undertaken without just cause or excuse. Judgment shall be entered for the Plaintiff on Count II of the complaint.

C. Count III of the Complaint: Section 523(a)(15)

Since the Court has found the debt in question nondischargeable under section 523(a)(6), a section 523(a)(15) analysis is unnecessary.

IV. CONCLUSION

Because the Plaintiff has satisfied her burden under section 523(a)(6), the Debtor's obligation to pay the Plaintiff $135,000 is nondischargeable. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

Entered at Manchester, New Hampshire.

Dated: October 21, 2003

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge